88-289

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DONALD E. CANNON,
Petitioner,

vs.

LEWANNE ROWEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July, 1988

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DONALD E. CANNON, Petitioner,

v.

LEWANNE ROWEN, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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STATEMENT OF THE CASE

Although the Petitioner's statement of the case contains argument, the facts it sets forth are essentially correct. The pertinent inquiry is whether the Court of Appeals appropriately dismissed the appeal for lack of jurisdiction pursuant to 28 U.S.C. § 1447(d).

SUMMARY OF ARGUMENT

An order of the District Court remanding an action to the state court is not reviewable notwithstanding the fact the District Court also entered an order in the same decree denying Petitioner's motion to vacate a state court judgment pursuant to F.R.Civ.P.
Rule 60(b) for the following reasons:

1. A Rule 60(b) motion may only address orders and rulings emanating out of the court in which the motion was filed and therefore such a motion was inappropriately brought before the District Court to vacate a state court judgment.

2. An order of the District Court properly remanding a case to the state court under the grounds set forth in 28 U.S.C. § 1447(c) is non-reviewable notwithstanding the fact the same District Court decree contained an order denying a motion to vacate a state court judgment

under F.R.Civ.P. Rule 60(b) in that the later motion and order thereon did not go to the merits of the Petitioner's case.

ARGUMENT

The Petitioner first asserts that the denial by the District Court of its motion to vacate a judgment pursuant to F.R.Civ.P. Rule 60(b) is reviewable. If the judgment sought to be vacated emanated out of the court wherein the motion was filed and was not coupled with an order remanding the case, the Petitioner's proposition might be correct. However in this case not only was the overall thrust of the District Court's ruling an order remanding the case to state court, the F.R.Civ.P. Rule 60(b) motion was not even properly before it. The District Court was being asked to vacate a state court judgment. It appears well settled that a Rule 60(b) motion is limited to addressing orders and rulings emanating out of the

court in which the motion is filed. The Court in Goodwin v. Home Buying Investment Co. Inc., 352 F. Supp. 413, 416 (1973) stated the rule as follows:

> In so far as plaintiff relies on Rule 60(b) of the F.R.Civ.P., the court can only observe that such reliance is misplaced when the judgment from which a party seeks relief was not a judgment of the court in which the relief is sought. Taft v. Donellan Jerome, Inc., 407 F.2d 807, 809 (7th Cir. 1969); 7 Moore, Fed. Prac. § 60.33, p. 504 (1972)

See also Indian Head Nat. Bank of Nashua v. Branelle, 689 F.2d 245, 249 (1st Cir. 1982); Bankers Mortg. v. U.S., 423 F.2d 73, 78-79 (5th Cir. 1970).

The most important initial inquiry really is whether or not the District Court remanded the case under the grounds set forth under 28 U.S.C. § 1447(c). That section mandates remand if it appears "that the case was removed improvidently and

without jurisdiction." Although the grounds are stated in the conjunctive, it is well settled that they are to be considered in the disjunctive and if the District Court finds that either the removal was improvident or without jurisdiction, remand is required. In other words, although the District Court may have jurisdiction of the case, if it was improvidently removed, a remand is required under 28 U.S.C. § 1447(c) and the order remanding the case is not subject to review pursuant to 28 U.S.C. § 1447(d). See Thermtron Products Inc. v. Hermansdorfer, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed. 2d 542 (1976); Chlorox v. U.S. Dist. Court for N.D. of California, 779 F.2d 517, 520 (9th Cir. 1985); London v. U.S. Fire Ins. Co., 531 F.2d 257 (5th Cir. 1976); Robinson v. Ball, 534 F.2d 63, 65 (5th Cir. 1976); Federal Deposit Insurance Corp. v.

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Alley, 820 F.2d 1121, 1123 (10th Cir. 1987).

The District Court in this case specifically found that the case was untimely removed and therefore improvidently removed pursuant to § 1447(c). (See Appendix page 10a). Accordingly, in that removal ruling was specifically made pursuant to 28 U.S.C. § 1447(c), the non-reviewability provisions of § 1447(d) become applicable.

The Petitioner nevertheless asserts that a narrow exception has been carved out by this Court in Waco v. U.S. Fidelity & G. Co., 293 U.S. 140, 143, 55 S.C. 6, 79 L.Ed. 244 (1934) which purportedly holds that an order entered prior to a remand order is appealable even though the remand order is not. It is submitted that this Court did not decree such a blanket exception in Waco but rather allowed appellate review of a court order dismissing a third party

defendant entered prior to the order of remand. The rationale of the Waco decision was similarly addressed by the Ninth Circuit in Gallea, et al. v. United States of America, et al., 779 F.2d 1403 (9th Cir. 1983). Briefly stated this rationale is that if the District court issued an order preceding the remand order going to the merits of the plaintiff's case, such as an order dismissing a party as in Gallea and in Waco, it could be reviewed. However this is not the case at bar. The order which the Petitioner seeks to appeal was not an order dismissing a party as in Gallea and Waco but rather an order denying a motion under F.R.Civ.P. Rule 60(b). The Court's order denying the Petitioner's motion certainly was not an order going to the merits of the Petitioner's case and in fact as previously pointed out, was a motion not properly before the District Court in that it did not address a

judgment emanating out of the District Court.

CONCLUSION

The Petitioner acknowledges and it is certainly the law that a remand order cannot be reviewed if grounded upon the provisions of 28 U.S.C. § 1447(c). Nevertheless, the Petitioner contends the an order denying a motion to vacate a state court judgment issued in the same ruling but prior to the order of remand, can be reviewed. Such is simply not the law in that the District Court based its remand order under the grounds set forth under 28 U.S.C. § 1447(c) and its ruling on the Rule 60(b) motion was simply not a ruling addressing the merits of the Petitioner's claim if such an exception of non-reviewability does even exist under 28

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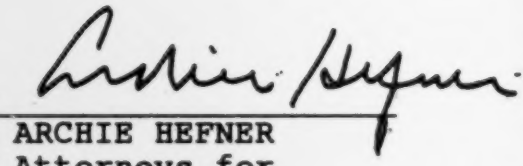
U.S.C. § 1447(d). As such, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: July, 1988 HEFNER, STARK & MAROIS

By 
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